# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 155

LEO NEIWIRTH, PETITIONER

*v.*

HYDROCARBON CHEMICALS, INC., ET AL.

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No. 217

SAMUEL S. STARR, ET AL., PETITIONERS

*v.*

HYDROCARBON CHEMICALS, INC., ET AL.

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

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### STATEMENT

The petitions seek review of the judgment of the court of appeals, sitting on rehearing *en banc*, affirming the district court's determination that the petitioners, attorneys for debtor corporations that had been parties to arrangement proceedings under Chap-

ter XI of the Bankruptcy Act, could not be compensated in the ensuing Chapter X reorganization because of their failure to obtain court authorization for such employment pursuant to General Order in Bankruptcy No. 44 (11 U.S.C. App. p. 2016; see 28 U.S.C. 2075).

The question of petitioners' fees arose at the completion of the proceeding under Chapter X for the reorganization of the debtor companies, Hydrocarbon Chemicals and its subsidiaries. At that time petitioners, who had been hired by the debtors' principal attorney, applied to the district court for compensation for legal services they had performed as special counsel for the debtors. The services had been performed when the debtors were the subject of an arrangement proceeding under Chapter XI of the Bankruptcy Act, 11 U.S.C. 701 *et seq.*, that preceded the Chapter X proceeding.[1] A receiver had been appointed at the outset of the Chapter XI proceeding, so that there was no "debtor in possession" (see section 342 of Chapter XI, 11 U.S.C. 742, Pet. App. 21a).[2]

The services for which petitioner Neiwirth sought compensation consisted of examining and contesting claims and obtaining waivers of deposit from creditors in the Chapter XI proceeding. Petitioners Starr, Weinberg & Fradkin sought compensation for obtaining the removal of a federal jeopardy tax assessment.

[1] An amended petition under Chapter X was filed, following the granting of motions of certain of the debtors' stockholders and the Commission to dismiss the Chapter XI proceeding, pursuant to Section 328 of the Bankruptcy Act, 11 U.S.C. 728.

[2] All references are to the appendix to the petition in No. 217.

The district court denied petitioners compensation because they had not obtained court orders authorizing their services under General Order 44 (Pet. App. 53a–54a). Accordingly, it made no evaluation of the services they had rendered (Pet. App. 53a).

General Order 44 requires a receiver, a trustee, or a debtor in possession to apply to the bankruptcy court for authorization to hire an attorney. The application must identify the attorney, explain why his services are needed, and detail his relationships to the various parties involved in the proceedings so as to disclose any adverse interests. Denial of compensation is specified by General Order 44 as a permissible sanction for failure to disclose an adverse interest in the application; the same sanction has been applied by the courts for failure to make an application.[3] And, where an attorney for persons other than those named in General Order 44 has sought compensation for services which should have been performed by an attorney for one of the persons specified in the Order, the absence of a court order authorizing such services has been held to bar compensation.[4]

The district court's denial of compensation to petitioners was in accordance with the Commission's recommendation.[5] On appeal, the Commission, having

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[3] *In re National Tool & Mfg. Co.*, 209 F. 2d 256 (C.A. 3); *Beecher* v. *Leavenworth State Bank*, 184 F. 2d 498 (C.A. 9); *Albers* v. *Dickinson*, 127 F. 2d 957 (C.A. 8).

[4] *In re Progress Lektro Shave Corporation*, 117 F. 2d 602 (C.A. 2); *In re Eureka Upholstering Co.*, 48 F. 2d 95 (C.A. 2); *In re Owl Drug Co.*, 16 F. Supp. 139 (D. Nev.).

[5] The Commission was a party in the district court, pursuant to Section 208 of Chapter X, 11 U.S.C. 608. As such, it

reconsidered the matter, joined petitioners in seeking a remand to the district court. The Commission urged that the district court should determine whether the services should have been performed by the attorney for the Chapter XI receiver; and, if not, that the district court should evaluate the services and award appropriate compensation.

The majority (Chief Judge Hastie and District Judge Weiner) of the panel of the court of appeals that first heard the appeal held that, since petitioners had not appeared as attorneys for any of the persons named in General Order 44 (Pet. App. 21a), the Order had no application to petitioners' services in the Chapter XI proceeding, unless their services "were such as should properly have been rendered by the attorney for the receiver appointed in the Chapter XI proceeding" (Pet. App. 24a). It directed a remand to the district court to determine (1) the value of the services (Pet. App. 26a) and (2) whether they should have been performed by the Chapter XI receiver's attorney (Pet. App. 24a). Judge Ganey dissented (Pet. App. 26a–32a).

Upon rehearing *en banc*, five of the eight[6] participating judges voted to affirm the district court. There is no opinion in which a majority of the court con-

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was an appellee in the court of appeals, *Ashbach* v. *Kirtley*, 289 F. 2d 159, 162 (C.A. 8), and is therefore a respondent before this Court (Rule 21(6)), although not designated as such in the petitions.

[6] Rule 4 of the rules of the court below provides, in accordance with 28 U.S.C. 46(c), that a senior judge may sit at a rehearing *en banc* if he participated in the original hearing of the matter. Thus, the court *en banc* included Senior Judge Ganey.

curred. Judge Ganey's opinion (Pet. App. 2a–8a), in which three of the five judges voting for affirmance joined, sets forth alternative grounds for concluding as a matter of law that petitioners were not entitled to compensation. That opinion holds, first, that an award of compensation from the estate for more than one counsel for the debtor is not permitted under the Bankruptcy Act (Pet. App. 4a) and, second, that "the services which had been performed under the Chapter XI proceedings and were used in the Chapter X proceedings by the appellants [petitioners here], rendered them at least de facto counsel for the trustee and as such they were acting without the approval of the court, which is required under a Chapter X proceedings" (Pet. App. 5a). Judge Ganey's opinion also stated that this second ground of decision was required by Section 328 of the Act (Pet. App. 7a), pursuant to which the proceedings had been transferred from Chaper XI to Chapter X, and added that court approval might have been obtained when the proceedings were transferred to Chapter X (Pet. App. 4a, 7a). The opinion further suggests that the services petitioners performed should have been performed by the attorneys for the Chapter XI receiver (Pet. App. 4a–5a)—although it is not clear whether this is intended to relate solely to petitioners Starr, Weinberg & Fradkin.

Judges Freedman and Seitz wrote separate opinions (Pet. App. 8a–10a) concurring in the affirmance of the district court solely on the ground that petitioners' services were the responsibility of attorneys for the Chapter XI receiver and that petitioners,

therefore, could not be compensated for performing such services in the absence of authorization for them to do so by the Chapter XI court pursuant to General Order 44.

Chief Judge Hastie, joined by two other judges, dissented (Pet. App. 11a–16a).

DISCUSSION

We agree with the three dissenting judges in the court below and, in particular, we disagree with the proposition expressed in Judge Ganey's opinion, which also represents the views of three judges, that the Bankruptcy Act does not in any circumstances permit compensation to be awarded from the estate to more than one counsel for the debtor. If a majority of the court clearly had so held, we would urge review of the decision by this Court. There is, however, no reason to believe that the concurring judges did not agree with the dissenting opinion on this point, since their concurring votes apparently rested on the particular facts of this case. In view of the lack of a definitive decision by the court below of the broader issues in this litigation, and because the decision below turns partly on the resolution of factual issues, we doubt that the decision requires review by this Court.

1. As Chief Judge Hastie notes in his dissenting opinion, there is no need to extend the coverage of General Order 44 to attorneys for persons not specified therein (Pet. App. 12a). The basic purpose of General Order 44 is "to protect the bankrupt's

estate—to conserve as much of it as possible for the creditors—first by preventing the unnecessary employment of attorneys to represent the officials having charge of the estate under the direction of the court, and second, when employment of attorneys is necessary, to assure that those employed are capable men who have no interest adverse to the estate."[7] The General Order thus prevents the estate from being overloaded with fees of persons who are entitled to at least some reasonable compensation for the time they spend. This right to compensation applies to those named in General Order 44—attorneys for receivers, trustees, and debtors-in-possession. Other participants and their attorneys are compensated from the estate only to the extent they can show direct benefit to it from their efforts.[8] Accordingly, there is no need to limit their number and the fact that more than one counsel may be acting as attorney for a debtor not in possession would appear to be immaterial.[9] As Judge Weiner noted in the majority opinion of the panel (Pet. App. 25a), "duplicative fees may not be awarded several attorneys who perform the work for which only one attorney is needed * * *."

We do not read Chief Judge Hastie's opinion as

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[7] *Widett* v. *D'Andria*, 241 F. 2d 680, 682 (C.A. 1).

[8] See *In re McGann Mfg. Co.*, 188 F. 2d 110, 112 (C.A. 3).

[9] As was noted in the majority opinion of the panel (Pet. App. 25a), "a pertinent canon of construction" is provided in Section 1 of the Bankruptcy Act (11 U.S.C. 1(35)): "(35) Words importing the singular number may be applied to mean several persons or things."

suggesting that it is immaterial whether the services involved should have been performed by the receiver and were reflected in his compensation. Presumably the receiver will be compensated even though volunteers have performed some of his duties, and duplication of such compensation must be avoided if the purpose of General Order 44 is to be achieved.[10]

2. In light of the opinions below, it is likely that henceforth prudent counsel for any party to a Chapter XI proceeding other than those specified in General Order 44 will at the outset seek authorization for their services from the Chapter XI court. This, however, leaves unresolved the problem whether compensation is permissible for attorneys who, like petitioners, have already performed services without court authorization. Moreover, some attorneys may now be reluctant to undertake to perform such services, even if authorized by the district court, because of the view expressed in Judge Ganeys' opinion that only one counsel for the debtor can be compensated. It is possible, therefore, that the decision below, although somewhat inconclusive, will tend to interfere with the free choice of counsel by Chapter XI debtors,

[10] While the concurring opinions of Judges Freedman and Seitz (and, at least as to Starr, Weinberg and Fradkin, Judge Ganey's opinion) express the view that the petitioners' services should have been performed by the receiver and his attorneys, they do not find it necessary to decide whether compensation of petitioners by the estate would represent duplicate payment for the benefits received from their services. The dissenting judges would appear to permit somewhat more flexibility in the division of services, so long as duplicate compensation is avoided (see Pet. App. 14a–16a).

and perhaps by creditors and stockholders in such proceedings as well. The efforts of such attorneys, who take the risk of failure or success in connection with their compensation, may be highly beneficial to the estate. In our view, Congress has not foreclosed the availability of such services.

## CONCLUSION

For the reasons stated, we believe the decision below was erroneous and may cause some confusion in the administration of Chapter XI of the Bankruptcy Act. In light, however, of the inconclusive nature of the decision, which rests partly on the resolution of factual questions, and because of the present lack of definitive rulings on the underlying legal issues by other courts of appeals, we doubt that the present case warrants further review.

Respectfully submitted.

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